Supreme Court, U. S.
FILED
OCT 31 1980
MICHAEL RODAK, JR., CLERK

No. 80-721

IN THE

Supreme Court of the United States

OCTOBER 1980 TERM

MICHAEL MULDOON ELDER
d/b/a VORPAL GALLERIES

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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A. QUESTIONS PRESENTED FOR REVIEW

1. "The various circuits are sharply divided on the issue of the 'quantum of animus' necessary for a section 8(a)(3) violation. Where an employer demonstrates a decline in business and shortage of cash, is it an unfair labor practice for the employer to place employees on layoff rather than filing a petition in bankruptcy, selling his car to finance continued operations, or issuing shares of stock to the employees in lieu of wages?

2. Where the record is uncontradicted that the employer is without funds to reinstate striking employees, can the Board rely upon the absence of formal financial statements (which did not exist at time of hearing) to support a finding that the employer has such funds? Or should the Court of Appeals remand the case to receive and consider formal financial statements?

B. LIST OF PARTIES

The parties to the case are petitioner, Michael Muldoon Elder, doing business Vorpal Galleries and the National Labor Relations Board.

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1. "The various circuits are sharply divided on the issue of the 'quantum of animus' necessary for a section 8(a)(3) violation." The Supreme Court should resolve this sharp division and determine that where an employer has demonstrated a decline in business and a shortage of cash, it is not an unfair labor practice for the employer to place employees (who are striking in protest of non-payment of wages) on layoff rather than filing a petition in bankruptcy, sell-

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PETITION FOR WRIT OF CERTIORARI

D. REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals is not published but appears at p. 51 of the Appendix. The National Labor Relations Board decision and clarification appear at 227 NLRB No. 65, Appendix pp. 58-68. The decision and recommended order of the Administrative Law Judge appears at Appendix p. 69.

E. GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT IS INVOKED.

1. The judgment sought to be reviewed was entered August 6, 1980.

2. Petition for rehearing and petition to augment the record were filed May 14, 1980 and were denied August 4, 1980.

3. The Supreme Court has jurisdiction to review the judgment by writ of certiorari under 29 U.S.C. §3160(e) and 28 U.S.C. §1204.

F. STATUTES INVOLVED IN THE PETITION FOR CERTIORARI

See Appendix A, pp. 1-4.

G. STATEMENT OF THE CASE

Petitioner operates an art gallery in San Francisco known as Vorpal Gallery. He failed to pay 11 employees compensation accrued to January 9, 1976. The 11 went out on strike in protest. Petitioner on January 23, 1976 paid the 11 employees and concurrently wrote them that jobs had been consolidated and that the 11 employees were placed on layoff.

The general counsel complained that the layoff constituted an unfair labor practice converting an economic strike to an unfair labor practice strike. Petitioner contended that layoff is not a discharge; that the layoffs were required by economic necessity; and that there is no substantial evidence that the layoffs were unlawful discharges in retaliation for the protected activity of striking.

The petitioner introduced documentation showing:

-- A drop in sales in December 1975 to $16,995 from $23,337 in 1974, and a drop in sales in January 1976 to $12,915 from $20,891 in January 1975. (Tr. 112-115; Respondent Elder's Exhibit 4, hereinafter RX4).

-- A letter from the petitioner's landlord showing that as of the time of the layoffs in January 1976, petitioner had failed to pay his $1,000 per month rent on the Gallery for four months, and also had failed to pay in February and March of 1976. (RX5)

-- A notice of termination of the lease on the Gallery - RX6.

-- An IRS Notice to Make Special Deposit of Taxes - RX7.

-- A Notice of Revocation of the California Sales Tax Permit - RX8.

Non-production of formal financial statements for 1975 was explained by unrefuted testimony that they were not available:

"JUDGE STEVENS: Do you have any profit-and-loss statements or financial statements prepared for your business by your accountant?

"THE WITNESS: They are being prepared now.

"JUDGE STEVES: For 1975?

"THE WITNESS: For '75." (Tr. 152)

Complainant Kearcher testified that she suggested incorporating the Gallery and issuing shares to the employees to raise money. (Tr. 71) Kearcher testified: "There were always people calling, asking for payment." (Tr. 74)

Mr. Jaccard, a complainant who was reinstated shortly after the layoffs, testified:

"Well, I had difficulty ordering supplies for picture framing. That was indicative to me that they were still having financial problems." (Tr. 99)

The strikers suggested that Elder sell his car and sell some works of art at cut prices. (Tr. 49) Elder replied that he had already borrowed as much as he could on the car to cover operating expenses. (General Counsel Exhibit 3, hereinafter GCX 3; Tr. 162.)

As to the suggestion that the Gallery sell works of established artists at cut prices, Mr. Elder replied that this would be bad business in the long run because "such an action would tend to deflate the market and negate future sales of art to people who had purchased at the current values." (GCX 3)

Striking employee Marriet Muller threatened Elder with criminal prosecution for nonpayment of wages due to the strikers.

> "This is to notify you that you are also in criminal violation of the labor laws of California. Immediate compliance with our position will eliminate the need for further action on our part." RX3.

Faced with the threat of criminal prosecution if he did not pay the strikers by Monday, January 26, 1976, Elder paid them on Friday, January 23, 1976 and notified them:

> "With everything that has occurred, it is clear that Vorpal Gallery, San Francisco, has been radically overstaffed. Sales will simply not support the number of people working at the gallery, given the nature of the business at this time. The realities of the situation must be faced.

"Therefore, you should consider yourself laid off and file for unemployment, if you have not already done so. [Emphasis added.]

"We wish to cut the payroll and only hire when we feel there is enough cash to avoid late payrolls. Thus there will be a bare minimum of rehiring. [Emphasis added.]

"The frameshop will be cut to one framer." [Striker Jaccard was rehired. Tr. 92/12] (GX4)

While California Unemployment Compensation Code §1262 makes employees ineligible for unemployment compensation during a trade dispute, the foregoing notice removed the ineligibility by notifying employees that w work was no longer available. Ruberoid v. California Unemployment Ins. Appeals Board (1963) 59 Cal.2d 73.

After the layoff, Elder rehired strikers John Jaccard (Tr. 95) and Michael Terry Jones (Tr. 98). Striker Thomas J. Wing Wo was offered reemployment but refused becaused he wanted a raise in pay (Tr. 156).

Jaccard and Jones continued to be paid late after they were rehired so they quit (Tr. 99).

Rene Fittinghoff was a new hire (Tr. 29) who quit a week later (Tr. 127) as a result of late payment of wages (Tr. 101).

Elder also employed two previous employees (who had not been strikers) as independent contractors to do framing (Michael Vensell - Tr. 96) and to do printmaking (Richard Royce - Tr. 98).

Vensell and Royce by agreeing to serve as independent contractors did not have to be paid twice a month. Employees, by contrast, must be paid twice a month on pain of criminal penalty if they were not so paid. California Labor Code Sections 204 and 210.

If we add these persons to the five employees retained (Donn Downing, Barbara Gronbeck, Harriet Payne, Sean Duggan and Jean Dunne) (Tr. 127-128), we come up with nine persons. Duggan took the job Wing Wo refused. Subtracting Duggan gives eight persons.

Either way it is computed, Elder ended up with a staff approximately one-half the size of his previous staff of sixteen.

The Administrative Law Judge found that Elder had terminated the strikers - rather than placed them on layoff; that Elder's motive was to retaliate against the striker for protected collective activity; and that the termination converted an economic strike into an unfair labor practice strike.

The Administrative Law Judge proposed the remedy that Elder should offer the strikers reinstatement upon receipt of unconditional application therefor, and compensate them for loss of pay.

The National Labor Relations Board affirmed. Upon motion of the General Counsel for Reconsideration the Board reserved to the enforcement phase of the proceedings the question whether the strikers had already unconditionally applied for reinstatement.

The Court of Appeals enforced the order of the Board, its entire opinion stating:

> "There must be substantial evidence in the record as a whole that retaliation for strike activity was the dominant or moving cause for the terminations. Western Exterminator Company v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977). We cannot say there is not. At one point, Elder stated that he would need to decrease his staff by one half to meet financial difficulties. But instead of seven being discharged, eleven were terminated--all of the strikers. While the case is a close one, this, together with other evidence, is sufficient to uphold the Board. [Emphasis added.]
>
> "There was no error in deferring to compliance proceedings the issue of whether or when the employees made an unconditional offer to return to work. NLRB v. International Association of Brideworkers, Local 433, 600 F.2d 770, 778 (9th Cir. 1979)."

Upon petition for rehearing, Elder pointed out that Elder had in fact reduced his staff by one-half from 16 employees to eight employees (Appendix pp. 22-24).

Upon motion to augment the record, Elder offered the financial statements showing that the San Fancisco gallery lost $125,852.41 during 1975, that Elder had cash of $2,566.17

on January 31, 1976 and a deficit cash position of $5,293.86 on February 27, 1976, and that Elder had current liabilities exceeding his current assets by $74,662 upon December 31, 1975, $80,370 upon January 31, 1976 and $88,271 upon March 31, 1976. Appendix pp. 43-44; 48.

The motion to augment the record was denied and the petition for rehearing was denied, both without comment by the Court of Appeals.

The Court of Appeals entered judgment in the form of the Board's order of December 20, 1976 without amendment.

H. FEDERAL JURISDICTION OF THE COURT OF APPEALS

Section 10(e) of the Labor Management Relations Act, 29 U.S.C. §160(e) gives the Court of Appeals and the Supreme Court jurisdiction to enforce, modify, or refuse enforcement of the order of the National Labor Relations Board.

I. ARGUMENT

1. "The various circuits are sharply divided on the issue of the 'quantum of animus' necessary for a section 8(a)(3) violation." The Supreme Court should resolve this sharp division and determine that where an employer has demonstrated a decline in business and a shortage of cash, it is not an unfair labor practice for the employer to place employees (who are striking in protest of non-payment of wages) on layoff rather than filing a petition in bankruptcy, selling his car to finance continued operations, or issuing shares of stock to employees in lieu of wages

As the court noted in Western Exterminator Co. v. N.L.R.B. (9th Cir. 1977) 565 F.2d 1114 at 1118:

> "The various circuits are sharply divided on the issue of the 'quantum of animus' necessary for a section 8(a)(3) violation. See NLRB v. Montgomery Ward & Co., 554 F.2d 996, 1002 (10th Cir. 1977) (partially motivated); Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 570 (4th Cir. 1977) (no discharge except for); Oil, Chem. & Atomic Workers Int'l Union v. NLRB, 178 U.S.App.D.C. 278, 293, 547 F.2d 575, 590 (1977), cert denied, --- U.S. ---, 98 S.Ct. ---, 54 L.Ed.2d --- (motivated in any part); NLRB v. Townhouse T.V. & App., Inc., 531 F.2d 826, 828 (7th Cir. 1976) (motivated at least in part); NLRB v. Gentithes, 463 F.2d 557, 560 (3d Cir. 1972) (substantial or

motivating cause); NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 (1st Cir. 1971) (dominant motive); NLRB v. Gladding Keystone Corp., 435 F.2d 129, 131 (2d Cir. 1970) (partially motivated); Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617, 621 (5th Cir. 1961) (moving cause). See generally, R. Gorman, Labor Law 137-42 (1976).

"An analysis of the Supreme Court opinions in this area leads us to conclude that our position, that anti-union animus must be the dominant or moving cause, is the better rule. The Court has held that where the employer's conduct is inherently destructive of section 7 rights, unlawful motivation is presumed to exist. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967); NLRB v. Brown, 380 U.S. 278, 287, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965); American Ship Building Co. v. NLRB, 380 U.S. 300, 311, 85 S.Ct. 955, 13 L.Ed. 855 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221, 228, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 45, 74 S.Ct. 323, 98 L.Ed. 455 (1954). Even where illegal animus is presumed to exist, however, the Board need not find a violation of the Act.

> "[S]uch situations [inherently destructive employer conduct] present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operat-

> ing his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.
>
> NLRB v. Erie Resistor Corp., supra, 373 U.S. at 228-29, 83 S.Ct. at 1145-1146; See also, NLRB v. Great Dane Trailers, supra, 388 U.S. at 33-34, 87 S.Ct. 1792; American Ship Building Co. v. NLRB, supra, 380 U.S. at 311-12, 85 S.Ct. 955."

Where the record establishes the entirely proper motive for the employer to place strikers on layoff -- that he is without funds to pay them and it is a crime to employ them without making payment -- the courts should not permit the Board to rest a finding of unfair labor practice upon the proposition that the employer was also angry with the strikers, thus rendering his proper business conduct an unfair labor practice.

The Administrative Law Judge wandered far off the course by inquiring why Elder had not filed a petition in bankruptcy, and whether Elder was insolvent, and emphasizing that Elder had not offered a "specific" plan

of action -- selling his car, selling shares of stock in the gallery to employees, or slashing sale prices.

> "JUDGE STEVENS: .... I have to interrupt, Mr. Moran, but I am not very clear about something.
>
> "Mr. Downing, is it my understanding from the testimony that you have given us so far, that, for some time past now, the company has not been able to meet its current obligations from current revenues?
>
> "THE WITNESS: Yes.
>
> "JUDGE STEVENS: How does it happen that you have not petitioned bankruptcy?
>
> "THE WITNESS: That was an option.
>
> "JUDGE STEVENS: My question is, how does it happen that you have not done this? Apparently, it has been some time now that you have been in this position.
>
> "THE WITNESS: It was just a decision not to, particularly.
>
> "JUDGE STEVENS: Thank you." (Tr. 125)

In the same vein, the Administrative Law Judge in his decision does not ask whether Elder had a proper economic purpose for the layoffs but instead discusses insolvency:

"Defense of Economic Necessity" (R. 25)

"...it does not support the contention that Respondent was unable to meet current expenses from current revenue." (R. 26)

"Respondent's claim of insolvency in late 1975 and early 1976 simply is not believable." (R. 27)

"10/ Insolvency was not established and probably did not exist." (R. 29)

The questions of the Adminstrative Law Judge and his decision on this point are completely beside the point. It has never been the law and is not now the law that an employer must go insolvent and file a petition in bankruptcy rather than lay off employees to avoid insolvency and bankruptcy.

The Administrative Law Judge again wanders from the issue and displays what can only be called prejudice when he castigates the petitioner for failure to "offer to the employees a specific plan of action." (R. 28)

"Rather than considering himself paternalistic, Elder considered the employees the possibly moving force in resolving his own financial problems.

> On many occasions he asked for their patience, good faith, positive assistance, voluntary reduction of staff, resumption of work, cooperative attitude, interruption of picketing and expressions of faith and trust. However, on no occasion did he offer to the employees a specific plan of action. He dealt only in generalities and platitudes. Even more telling, he insisted that the best way, and only practical way, out of the difficulty was for the employees to exert added effort to make sales, so cash would be available for salaries. This is a cynical approach, in view of the varied nature of jobs performed by the employees, and the long history of late salary checks. Elder's contention of paternalism is speculative and is not believable." (R. 28)

As noted above, the employees had demanded specific plans to assure their payment, such as the plan that Elder sell his personal automobile and pay them with the proceeds, or that Elder incorporate his business and give them shares of stock in lieu of wages.

But the Labor Management Relations Act nowhere imposes upon an employer a legal duty to sell his automobile, turn shares of stock in his business over to employees, declare bankruptcy, or take any similar action.

Rather, the employer is free to place employees on layoff for economic reasons such as the economic reason of avoiding the sale of his personal automobile, avoiding the transfer of a proprietary interest in his business to employees, or the purpose of avoiding bankruptcy.

By sitting in judgment upon the substantive terms of the employer's refusal to sell his business to his employees, the Administrative Law Judge violated the admonitions of the Supreme Court in N.L.R.B. v. American Nat. Ins. Co. (1951) 343 U.S. 395 at 404 that it is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

In Porter Co. v. NLRB (1970) 397 U.S. 99 at 103-104, this Court emphasized:

> "The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and

> their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act." [Emphasis added.]

The Administrative Law Judge seeks to bolster his improper conduct of sitting in judgment on the employer's refusal to sell his car or sell ownership of his gallery by finding retaliatory animus. To this end, the Administrative Law Judge selected three quotations from Elder's testimony, each out of context. The full relevant quotations are set forth below in the Appendix B, pp. 5-9 with the passages which were quoted out of context underlined.

In the most egregious case, the Administrative Law Judge extracts a question and

answer from page 179 of the reporter's transcript and follows it by a question and answer from p. 184 without showing the omission of the five pages of intervening explanation - indeed without showing the omission at all!

The only fair reading of the transcript is that Elder was out of cash; that the striking employees refused to work any longer on credit; and that Elder was baffled by the strike because he did not see how striking and interfering with sales could produce any cash to meet the employees demands for cash.

The whole purpose of a strike is to discourage sympathetic members of the public from patronizing the struck business establishment and to reduce the business of and the cash flow to the struck business establishment.

If it is an unfair labor practice for an employer to recognize and take into account the fact that a strike does indeed reduce the

employer's business, then every employer is guilty of an unfair labor practice in every response to a strike -- which is nonsense.

Where the employer has established proper business motive for his conduct -here placing striking employees on layoff - it is an improper indirect demand for concessions from the employer for the Board to rest an unfair practice charge upon the finding that the employer is angry at the strikers.

What employer is not angry at strikers? Only a masochist would invite a strike and enjoy the injury to his business caused by a strike.

In Universal Camera Corp. v. National L.R. Bd. (1950) 340 U.S. 474 at 490, Justice Frankfurter declared for a unanimous court:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Con-

> gress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." [Emphasis added.]

The present case is a classic of judicial abdication of the judicial function:

Employees strike because the employer has no cash to pay their wages and the employees decline to work on credit.

Recognizing his lack of cash and the refusal of employees to work on credit, the employer places the employees on layoff.

The Labor Board orders the employer to reinstate all of the employees with full back pay.

The sole fact cited by the Court of Appeals is that the employer said that he only had to cut his staff in half. But the Court of Appeals ignores the fact that the employer did only cut his staff in half. Upon that plain misreading of the record, the Court of Appeals (declaring it to be a close case) enforces the order of the Labor Board.

In short, if an employer cannot afford to pay his employees, the Labor Management Relations Act imposes upon the employer the duty to reinstate all employees with full backpay if the employer has placed them on layoff.

"'If the law supposes that,' said Mr. Bumble. . . . If that's the eye of the law, the law's a bachelor; and the worst I wish the law is, that his eye may be opened by experience -- by experience. . .'" Dickens, Oliver Twist, pp. 317-318 (The Works of Charles Dickens, London, New York, The

Waverly Book Company, Cassell & Company Ltd., 1880).

2. The evidence was uncontradicted that the employer was unable to pay his employees. If the absence of formal financial statements was sufficient to overcome the uncontradicted evidence, it was error for the Court of Appeals to deny petitioner's motion to augment the record

Rather than directing Elder to produce his books and records, or postponing decision until financial statements had been completed, the Administrative Law Judge rejected the uncontradicted evidence of severe financial strain stating:

> "In any event, the burden of proving financial motive was Respondent's burden. No financial statement or other convincing proof of financial condition was offered. The burden not having been met, this defense is not accepted." (Appendix p. 92).

But the Administrative Law Judge has power independent of what the parties offer:

> "(k) To call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence" (29 C.F.R. §102.35(k)).

A commonly used guide notes:

> "The ALJ is responsible for seeing that all pertinent facts are elicited. Hence he may ask questions of witnesses and even introduce witnesses of his own. He may accept evidence which throws light on violations even though the conduct involved is not alleged as unlawful in the charge or complaint." Labor Relations Expediter p. 397 (Bureau of National Affairs 1980).

Even as to the General Counsel, the courts have held:

> "The General Counsel has responsibilities beyond that of a mere adversary. As a public official he has a duty and obligation to be fair to all parties and not to knowingly suppress relevant evidence." N.L.R.B. v. Selvyn Shoe Manufacturing Corp. (8th Cir. 1970) 428 F.2d 217, 225).

If the financial statements were crucial to decision of the case, then the General Counsel and the Administrative Law Judge were under duty to call the proper witnesses and compel the statements to be prepared and produced.

Morevoer, in imposing the burden of proof upon Elder rather than the General Counsel, the Administrative Law Judge acted contrary to law.

In Top of Waikiki, Inc. v. N.L.R.B. (9th Cir. 1970) 429 F.2d 419, 421, the court said:

> "We recognize that an affirmative duty rests upon General Counsel to establish by substantial evidence that, in respect to the discharges in question, petitioner was motivated to do so because the discharged employees had engaged in protected, concerted activities."

When produced, the financial statements confirmed totally the testimony of every witness and every document produced: That Elder was in severe financial difficulty, had severe losses at the San Francisco gallery, and was suffering from a severe shortage of cash.

The San Francisco gallery lost $125,842.41 in 1975 whereas the galleries in other cities earned profits which reduced the net loss for the year to $14,062.52. Appendix p. 40.

Elder had a net cash position of only $2,566.17 on January 30, 1976, a negative cash position of $5,293.86 upon February 27,

1976 and an excess of current liabilities over current assets of $87,370 and $88,271 upon January 31, 1976 and March 31, 1976.

Setting aside the tendentious characterizations by the Administrative Law Judge of what he supposed Elder's motives to be ("cynical"), the economic reality is that Elder's San Francisco gallery was a financial disaster area, that its costs far exceeded its revenues, and that Elder had to staunch the excess of cash outgo from the San Francisco gallery over income from the San Francisco gallery if he hoped to survive in business.

Section 10(e) of the Labor Management Relations Act, 29 U.S.C. §160(e) expressly provides:

> "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record."

As noted above, the record is uncontradicted that the formal financial statements had not been completed at the time of hearing before the Administrative Law Judge, and indeed the accountant's affidavits attached to the motion to augment the record did not exist until March 11, 1980 and May 12, 1980.

If the Labor Management Relations Act is to be administered upon the basis of fact - rather than upon the basis of speculation - the enforcement of the Board decision should be refused upon the uncontradicted evidence that the employer could not afford to continue to employ the complainants. If formal financial statements were required to establish the facts, then the Court of Appeals should have remanded the case for hearing under Section 10(e) of the Act.

The resources of the National Labor Relations Board and its counsel are unlimited.

The resources of this employer were minuscule at the time of the initial hearing.

The purpose of the Labor Management Relations Act was to encourage collective bargaining and to reduce disruptions of interstate commerce. The Act never had the purpose of victimizing employers and subjecting them to harsh penalties because the employer failed to produce relevant documents if neither the General Counsel nor the Administrative Law Judge required the production of formal financial statements.

If section 10(e) of the Act is to be construed in accordance with its purposes, and if formal financial statements are needed to bolster the uncontradicted evidence of the employer's financial distress, then the case should be remanded to the Board to receive formal financial statements in evidence.

CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari (1) to resolve

the sharp division among circuits on the "quantum of animus" required to convert lawful business activity to an unfair labor practice, and (2) to clarify when section 10(e) of the Labor Management Relations Act requires a case to be remanded to take additional evidence.

Dated: October __, 1980.

Respectfully submitted,

By _____
Richard Harrington
Attorney for Petitioner
Michael Muldoon Elder
doing business as
Vorpal Gallery

APPENDIX A

STATUTES INVOLVED IN
THE PETITION FOR CERTIORARI

Labor-Management Relations Act section 8(a)(1) and (3), 29 U.S.C. §158(a) and (3), provides in pertinent part:

> "(a) It shall be an unfair labor practice for an employer -
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> . . . .
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

Section 10(e) of the Labor Management Relations Act, 29 U.S.C. §160(e) provides in pertinent part:

> "(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business,

for the enforcement of such order. . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power. . . to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or

setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

California Labor Code Section 215 provides:

"Any person, or the agent, manager, superintendent or officer thereof, who violates any provision of Sections 204, 205, 207, 208, 209 or 212 is guilty of a misdeameanor."

California Labor Code Section 204 provides:

"All wages, other than those mentioned in Section 201, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. . ."

California Unemployment Insurance Code §1262 provides:

> "An individual is not eligible for unemployment compensation benefits, and no such benefit shall be payable to him, if he left his work because of a trade dispute. Such an individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed."

"Q. When you became aware at this point that the employees were not willing to cut back their hours enough or accept voluntary lay-offs with severance pay, what decision did you make concerning the resolution of this problem?

"MR. HOPKINS: If any.

"MR. MORAN: Right.

"THE WITNESS: Well, I think that's obvious. Simply that we looked at our balance sheet: there's no cash. We have people who are saying that they will only come back to work if they have a guarantee of the cash.

"So the decision was to, at that moment, clean the slate and then, as soon as cash came in, rehire the most -- some of the people and have them consolidate their activities so that we would have a much smaller staff. It was a physical impossibility to keep anybody there on the basis that they were, because they wouldn't be there, they'd be in front of the gallery and hindering our business." (RT 166)

. . . .

"Q. Now, could you list the facts in your mind that were responsible for this decision to lay the people off, in summary?

"A. Well, the basic factor was the impracticality of the enormous staff compared to income. Because income fluctuates in an art gallery, perhaps I had been a bit more optimistic than looking at the cold facts, economic facts that the situation indicated.

"Of the people here, I was totally shocked that there was the motion that was made, because all the people here I had liked - I had not hired people that I had bad feelings about, and so on; and I had no vindictive motivation in laying the people off in response to what I felt was a misguided and misinformed position.

"Q. Now, even after this layoff, you were willing to rehire some of the people who had been the very strikers.

"A. That's one indication of the actuality of my generalization.

"Q. The fact that they struck - was that responsible for your decision to lay them off?

"A. I'd say that certainly it was a factor. It had to be a factor. It called attention to the problem - it was a red flag.

"But I would say it was more of a catalyst than it would be an essential cause in laying them off.

"Q. In other words, it was like the straw that broke the camel's back?

"A. You might say. I wouldn't even say that, because the final motivation was an economic one. I don't know if I can find the right metaphore [sic] for it. It was what made me aware; it was the final thing that made me aware of the problem, the striking.

"I mean, I was in New York and running the New York Gallery and thinking that things were going and working relatively stable. And the problem I was having, again, against a rational position on an economic basis, I was hoping that things would get better,

things would get better, but at the same time, making contingency plans in a rought sense, for how to go about it." (RT 169-170)

. . . .

"Q. You thought, then, there was a possibility you might weather the storm so to speak.

"A. Sure.

"Q. But for the strike.

"A. No. No, I knew that I had to cut back. The strike simply had to do with when I was going to cut back --

"Q. (Interrupting) Would it be fair to say that the strike was far more persuasive than all the advice of your business friends over a period of three or four years?

"A. I would say that the total economic unfeasibility of trying to operate a business where people won't work for pay and won't work on a -- the strike changed the situation and it was the final point that showed me that I can't run a business on potential money.

"Q. I would like to examine your thoughts if I might. What was it about the strike that made something clear to you in January that apparently had not been clear to for several years before? What was it about the strike?

"A. You must not have been listening to the conversation -- the testimony. I said that the strike changed the nature of my business operation.

"In business, generally you can buy materials and pay somebody within, say, a

30-day period or a reasonable period. The same kind of application had been functioning with the employees. They didn't particularly like it; they accepted it. The strike changed all that.

"Q. But aren't you testifying, sir, that if the employees had not gone on strike they would not have been laid off?

"A. No, I'm not testifying to that. I am testifying that they all would not have been laid off as soon as they were. I would think that's a fairly reasonable conclusion.

"JUDGE STEVENS: Are you saying that they would have been laid off, but later?

"THE WITNESS: Yes." (Rt 173-174)

. . . .

"Q. You made a comment that you were concerned about the strike 'inhibiting our business.' Was that a factor in the layoff of the employees?

"A. Ultimately, no.

"Q. Anything less than ultimately? Was it considered?

"A. Well, if somebody is walking up and down in front of your business, wanting to -- with signs that lessen your capacity to survive, unless you're a fool you take it into consideration, of course.

"But I think it's just like a father can see a little son hitting him on the leg. It depends on how it hurts. That doesn't mean he's going to banish the son.

"Q. Did you have a somewhat paternalistic attitude to your employees?

"A. I think I did. That's very astute.

"Q. Did you consider the strike an act of childish irresponsibility and disobedience?

"A. I was baffled by the strike." (RT 176-177)

APPENDIX C

RECEIVED
Richard H. Deane
Clerk, U.S. Court
of Appeals
May 30, 1980
Filed 8-6-80 OT
Docketed 5-30-80 DM

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	No. 77-2104
	)	
v.	)	
	)	
MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES,	)	
	)	
Respondent.	)	

JUDGMENT

Before: TRASK and WALLACE, Circuit Judges, EAST,* District Judge

THIS CAUSE came on to be heard upon an application filed by the National Labor Relations Board for enforcement of an order is-

* Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

sued by it against Respondent, Michael Muldoon Elder, d/b/a Vorpal Galleries, San Francisco, California, his agents, successors, and assigns, on December 20, 1976. The Court heard argument of respective counsel, on March 21, 1980, and has considered the briefs and transcript of record filed in this cause. On April 30, 1980, the Court being fully advised in the premises issued its order affirming the Board's Order.

ORDERED AND ADJUDGED by the Court that:

Respondent, Michael Muldoon Elder, d/b/a Vorpal Galleries, San Francisco, California, his agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging his employees for engaging in concerted activities for the purposes of their mutual aid or protection.

(b) In any other manner interfering with, restraining, or coercing his employees in the exercise of their rights under

Section 7 of the National Labor Relations Act, (hereinafter called the Act).

2. Taking the following affirmative action:

(a) Immediately notify Lesley M. Flesch, Lilah Thayer Toland, Susan M. Elsass, Shiwa Kartso Harris, John W. Jaccard, Michael Terry Jones, Michael Mulcahy, Mariett Muller, Kathryn Burke, Lynn Kearcher, and Thomas J. Wing Wo, Jr., that he has no objection to their reinstatement to their former jobs or, if such jobs are not available, to substantially equivalent jobs, and make them whole for any loss of pay they may have suffered by reason of their discharges in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy." (attached hereto as Appendix A.)

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying all payroll records, social security payment records,

timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms hereof.

(c) Post at his gallery in San Francisco, California, copies of the attached notice marked "Appendix B." Copies of the notice on forms provided by the Regional Director for Region 20, San Francisco, California, of the National Labor Relations Board, after being duly signed by said Respondent's authorized representative shall be posted by Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notice to employees customarily are posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the aforesaid Regional Director for Region 20, in writing within 20 days from the date of this Judgment, what steps Respondent has taken to comply herewith.

Endorsed, Judgment Filed and Entered

/s/ Richard H. Deane
Richard H. Deane
Clerk

SO ORDERED:
JUDGES:

/s/ Ozell M. Trask
OZELL M. TRASK, CJ

/s/ J. Clifford Wallace
J. CLIFFORD WALLACE, CJ

/s/ William G. East
WILLIAM G. EAST, DJ

costs in this court in favor of the petitioner and against the respondent.

Costs:

BRIEFS FOR THE PETITIONER[28 COPIES]	$106.78
RECORDS REPRODUCTION	17.50
	$124.28

APPENDIX A
[To Court of Appeals Judgment]

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The employees involved herein went on strike January 10, and commenced picketing January 15. A few attempts at negotiation, rather feeble and totally unsuccessful, were made by Elder and by the employees between January 10 and January 23. The employees named in complaint were laid off January 23. However, based upon the record and the layoff notice given to the employees (G.C. Exh.4) it is clear, and found, that the employees were discharged rather than laid off.

The initial strike by employees was called by them primarily to protest Respondent's repeatedly late payment of salaries. The strike was concerted activity protected by the Act, and it was in the nature of an economic, rather than an unfair labor practice, strike.

Elder acknowledges, and it is found above, that the strike precipitated Elder's discharge of the employees. Since the strike was protected by the Act, termination for striking constituted a violation of Section 8(a)(1) of the Act.11/

11/ Roemer Industries, Inc., 205 NLRB 63 (1973); Red Top, Inc., 185 NLRB 989 (1970).

The record does not show that the striking employees ever requested reinstatement.12/ Their letter of January 15 (G.G.Exh.6) appears to be no more than a continued offer to negotiate. Further, the record does not show the dates of employment of replacement employees, nor the types of jobs to which they were assigned. However, these matters can be determined at the compliance stage.

I shall recommend, therefore, that Respondent, upon application, offer the strikers named in the complaint reinstatement of their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to the extent that those positions were not permanently filled by replacements prior to any offer by the strikers unconditionally to return to work. Those strikers not reinstated pursuant to these provisions shall be placed on a preferential hiring list and shall be offered the first available positions for which they are qualified. I shall also recommend that Respondent make whole those strikers who are entitled to reinstatement for any loss of pay they may have suffered by reason of the Respondent's refusal, if any, to reinstate them upon request by payment to each of them of a sum of money equal to that which he or she normally would have earned as wages during the period beginning 5 days after the date on which he or she applies for reinstatement and terminating on the date of the Respondent's offer of reinstatement, such loss to be computed in the manner set forth in F. W. Woolworth Company 90 NLRB 289 (1950). Interest at the rate of 6 percent per annum shall be added to the backpay, to be computed in the manner set

12/ Mid-West Paper Products Co., 223 NLRB 1367 (1976).

forth in Isis Plumbing & Heating Co., 138 NLRB 176 (1962).13/

13/ The Laidlaw Corporation v. N.L.R.B., 414 F.2d 99 (1969).

APPENDIX B
[To Court of Appeals Judgment]

NOTICE TO EMPLOYEES

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing An Order of the National Labor Relations Board An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board found that I violated the National Labor Relations Act and has ordered me to post this notice. I intend to carry out the Order of the Board, the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves
To form, join or help unions
To bargain collectively through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refuse to do any or all of these things.

I WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of the Act, by discharging my employees for engaging in concerted activities for the purpose of their mutual aid or protection.

I WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the National Labor Relations

Act, by discharging my employees for engaging in concerted activities for the purpose of their mutual aid or protection.

I WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

I WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act. [Repetition in original.]

I WILL immediately notify Lesley M. Flesch, Lilah Thayer Toland, Susan M. Elsass, Shiwa Kartso Harris, John W. Jaccard, Michael Terry Jones, Michael Mulcahy, Mariett Muller, Kathryn Burke, Lynn Kearcher, and Thomas J. Wing Wo, Jr., that I have no objection to their reinstatement, and thereafter, upon their unconditional application for such, offer them reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

I WILL make whole those strikers who are entitled to reinstatement for any loss of pay they may suffer by reason of my refusal, if any, to reinstate them in the manner set forth above.

MICHAEL MULDOON
ELDER
D/B/A VORPAL
GALLERIES

APPENDIX D

FILED
Aug 4, 1980
Richard H. Deane
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	No. 77-2104
	)	
vs.	)	
	)	
MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES,	)	ORDER
	)	
	)	
Respondent.	)	
	)	

Before: TRASK and WALLACE, Circuit Judges, EAST,* District Judge

Respondent's petition for rehearing is denied.

* Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	No. 77-2104
	)	
v.	)	
	)	
MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES,	)	
	)	
	)	
Respondent.	)	
	)	

PETITION FOR REHEARING

ATHEARN, CHANDLER & HOFFMAN
RICHARD HARRINGTON
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(4150) 421-5484

Attorneys for Respondent

ATHEARN, CHANDLER & HOFFMAN
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Attorneys for Respondent

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES, Respondent.	)	No. 77-2104 PETITION FOR REHEARING

Petition for rehearing should be filed only to direct attention of the court to material facts or law possibly overlooked in the decision. This petition confines itself to such points.

1. The decision overlooks the fact that the staff of sixteen employees was reduced by one half: five were retained after the strike and three were reinstated.

The decision states:

> "At one point Elder stated that he would need to decrease his staff by one-half to meet financial difficulties. But instead of seven being discharged, eleven were terminated -- all of the strikers."

I respectfully suggest that the court has overlooked the fact that strikers John Jaccard (Tr.95) and Terry Thomas [Jones] (Tr.98) were rehired and striker Thomas J. Wing Wo was offered reemployment but refused because he wanted a raise in pay (Tr.156).

Elder also employed two previous employees (who had not been strikers) as independent contractors to do framing (Michael Vensell - Tr.96) and to do printmaking (Richard Royce - Tr.98).

If we add these persons to the five employees retained (Donn Downing, Barbara Gronbeck, Harriet Payne, Sean Duggan and Jean Dunne): Tr.127-128) we come up with nine persons. Duggan took the job Wing Wo refused. Subtracting Duggan gives eight persons.

Either way it is computed, Elder ended up with a staff approximately one-half the size of his previous staff of sixteen.

The court should take that into account.

Another crucial difference is that Vensell and Royce by agreeing to serve as independent contractors did not have to be paid twice a month upon the pain of criminal penalty if they were not paid under California Labor Code Sections 204 and 210.

Jaccard and Thomas continued to be paid late after they were reinstated so they quit. Tr.99/13.

2. The opinion overlooks the California law that it is a crime to employ people and fail to pay them by the 10th and 26th day of each month.

California Labor Code Section 204 requires that employees be paid by the 10th of each month for work performed from the 15th to the last day of the preceding month, and by the 26th day of each month for work per-

formed between the 1st and 15th day of each of month.

Labor Code Section 210 makes it a misdemeanor to fail to pay as provided in Section 204 - a fact that the strikers had drawn to Elder's attention by Respondent's Exhibit 3 dated January 13, 1976.

3. The opinion overlooks the fact that Elder paid the back wages on January 23, terminating the cause of the strike, and that Elder therefore was under a concurrent duty to reduce his staff to a level he could afford to pay in order to avoid repetition of the crime of late payment.

> "Q. Now, you have previously testified that the December 15 check was late and the January 1 check was late. When was the next check normally due?
>
> "A. It would have been due on the 15th of January.
>
> "Q. Did you receive it?
>
> "A. No.
>
> "Q. When did you receive the check that was otherwise due on the 15th?

"A. I received mine on the evening of January 23rd.

* * *

"Q. Was there anything accompanying the check?

"A. There was.

"Q. What was that?

"A. A termination notice." [General Counsel's Exhibit 4]. Tr. 28/8-25.

Labor Code Section 204 provides in pertinent part:

> "Labor performed between the 1st and 15th days, inclusive of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed. . ."

January 23, 1976 was a Friday and January 26, 1976 was a Monday and the last day upon which Elder could pay his employees for the work performed from January 1 to January 11, 1976 when the strike started.

Elder thus made his wage payments by the skin of his teeth on January 23, 1976.

Elder then faced the dilemma: If he retained all eleven strikers he would forth-

with commit the identical crime of late payment which was the cause of the strike in the first place.

The court now says that if Elder avoided the crime of late payment by not reinstating all eleven employees, he is guilty of an unfair labor practice and must reinstate all eleven employees (including the two reinstated and the one who declined reinstatement) with full backpay.

I can't think that the court really means to affirm such an unfair result.

4. The opinion overlooks the crucial distinction that a "layoff" is a term of art involving the right of recall when business permits, whereas "termination" is a permanent discharge.

Termination of employees for concerted activity is an unfair labor practice, but it is a fundamental rule that an employer has no duty to rehire strikers when no job exists. Phelps Dodge Corp. v. National Labor Rela-

tions Board, 313 U.S. 177 at 198, footnote 7 (1940).

In labor relations, "layoff" is a word of art: It means that employees are laid off the payroll due to lack of work but have the right of reinstatement when business improves.

"Termination" on the other hand is a permanent discharge. Even if business improves, the terminated employee has no right of reinstatement.

The court overlooks the fact that the alleged termination in the present case was by its own terms a layoff and not a discharge.

> "With everything that has occurred, it is clear that Vorpal Gallery, San Francisco, has been radically overstaffed. Sales will simply not support the number of people working at the gallery, given the nature of the business at this time. The realities of the situation must be faced.
>
> "Therefore, you should consider yourself laid off and file for unemployment, if you have not already done so. [Emphasis added.]
>
> "We wish to cut the payroll and only hire when we feel there is enough

cash to avoid late payrolls. Thus there will be a bare minimum of rehiring. [Emphasis added.]

"The frameshop will be cut to one framer." [Striker Jaccard was rehired. Tr. 92/12] * * *

General Counsel's Exhibit No. 4.

The whole point of a layoff as opposed to a discharge is that employees become eligible for unemployment insurance during the layoff (but not during a strike - California Unemployment Insurance Code Section 1262) and that employees on layoff will be recalled when business improves - precisely as was done in this case.

5. The court overlooked the uncontradicted evidence that Elder in fact could not afford to reinstate the striking employees.

Since the evidence of financial distress was totally uncontradicted (respondents exhibits 2-8 inclusive) I am at a loss to see how the Board could find that Elder was able to rehire the eleven strikers.

The General Counsel relies upon the rule:

"The production of weak evidence when strong evidence is available can only lead to the conclusion that the strong would have been adverse." Interstate Circuit, Inc. v. United States, 306 U.S. 226 (1939).

Applying this rule the General Counsel points out that the financial statements for 1975 were not produced.

But the 1975 financial statements were not available at the time of hearing. Tr.152.

I assume that this honorable court desires to decide cases on the facts and on the merits rather than contrary to fact.

I did not present the case at the initial hearing, and I cannot criticize respondent for failing to offer financial statements which were not available at the initial hearing.

To present the facts to the court, I respectfully move the court for leave to augment the record by offering the financial statements for December 31, 1975, January 31, 1976, February 29, 1976 and March 31, 1976.

The affidavit of Joseph Michael offered concurrently shows that Elder's cash position was $1,307.41 at December 31; $2,556.17 at January 30, 1976; and deteriorated to a deficit of $5,293.86 on February 27 and a deficit of $5,178.91 on March 31, 1976.

The affidavit of CPA Nordensten shows that Elder's working capital position deteriorated to the point that he had current liabilities of $88,271 in excess of current assets at the end of March, 1976.

Michael's affidavit shows that the San Francisco gallery in question lost $125,852.41 during 1975.

If the court desires to decide the case on the facts, the least it should do is remand the case for a finding of fact what Elder's true financial position was on January 23, 1976. The General Counsel had full power to subpoena Elder's record and offer them in evidence.

It adds nothing to the respect for the government with its billions in resources and manpower of thousands to decide a case contrary to the facts. It detracts from the dignity of this honorable court to sanction such a decision by the National Labor Relations Board.

CONCLUSION

For the reasons stated appellant respectfully moves the court to reconsider its decision of April 30, 1980 and deny enforcement to the order of the Board.

Dated: May 14, 1980.

/s/ Richard Harrington
Richard Harrington
Attorney for Respondent

APPENDIX F

FILED
Aug 4, 1980
Richard H. Deane
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES, Respondent.	)	No. 77-2104 ORDER

Before: TRASK and WALLACE, Circuit Judges, EAST,* District Judge

Respondent's motion to augment the record is denied.

* Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	No. 77-2104
	)	
v.	)	
	)	
MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES,	)	
	)	
	)	
Respondent.	)	
	)	

MOTION TO AUGMENT RECORD

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Attorneys for Respondent

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Attorneys for Respondent

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES, Respondent.	)	No. 77-2104

MOTION TO AUGMENT RECORD

Respondent MICHAEL MULDOON ELDER respectfully moves to augment the record by permitting the filing of the affidavits of Joseph Michael and Donald E. Nordensten filed concurrently. The schedules attached to the affidavits had not been prepared upon the

date of hearing before the Administrative Law Judge in May 1976.

Dated: May 14, 1980.

Respectfully submitted,

/s/ Richard Harrington
Richard Harrington
Attorney for Respondent

ATHEARN, CHANDLER & HOFFMAN
RICHARD HARRINGTON
111 Sutter Street
San Francisco, CA 94104

Attorneys for Respondent

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	No. 77-2104
	)	
v.	)	
	)	
MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES,	)	
	)	
Respondent.	)	

POINTS AND AUTHORITIES
IN SUPPORT OF MOTION
TO AUGMENT RECORD

Federal Rule of Appellate Procedure Rule 11(e) provides in pertinent part:

"If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be

certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

An original and three copies of this motion are being filed pursuant to Rule 27(d).

Respectfully submitted,

/s/ Richard Harrington
Richard Harrington
Attorney for Respondent

ATHEARN, CHANDLER & HOFFMAN
RICHARD HARRINGTON
111 Sutter Street
San Francisco, CA 94104

Attorneys for Respondent

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	No. 77-2104
	)	
v.	)	
	)	
MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES,	)	
	)	
Respondent.	)	

AFFIDAVIT OF
JOSEPH MICHAEL

The undersigned, JOSEPH MICHAEL, being duly sworn states:

I acted as accountant from June 1976 to date for Michael Muldoon Elder doing business as Vorpal Gallery. Vorpal Gallery had locations in San Francisco, New York (Soho), Laguna Beach and Chicago, and kept separate books for its reproduction operations.

Attached hereto are schedules prepared from the books and records of Vorpal Gallery:

1. Vorpal Galleries Cash Account Balances (Per Book Balance) at December 31, 1975, January 30, 1976, February 27, 1976 and March 31, 1976.

2. Vorpal Gallery, San Francisco Balance Sheets for December 31, 1975, January 31, 1976 and March 31, 1976 showing a negative working capital position.

3. Vorpal Galleries Balance Sheets for other locations for December 31, 1975, January 31, 1976 and March 31, 1976 showing negative working capital position except $955.77 for New York on January 31, 1976.

4. Vorpal Gallery, San Francisco's income statement for the Statement of Earnings from January 1, 1975 to December 31, 1975 showing a loss of $125,852.41.

5. Vorpal Galleries - Consolidated Income Statement for the Twelve Months December 31, 1975 showing loss of $14,062.52 for the entire operation.

6. Vorpal Gallery, San Francisco Statement of Earnings from January 1, 1976 to March 31, 1976 showing a loss of $1,227.90.

7. Vorpal Galleries Consolidated Income Statement for Three Months Ending March 31, 1976 showing a net profit of $4,756.17 for the entire operation.

The foregoing documents indicate that Vorpal Galleries suffered its principal losses in its San Francisco Gallery. They also indicate that Vorpal Galleries had a negative working capital position from December 31, 1975 to March 31, 1976 and that the cash account balances declined from $1,307.41 on December 31, 1975 to a negative $5,178.91 by March 31, 1976.

I prepared items 1 and 7 from records of the company. The other documents are records

kept or prepared by other person in the regular course of Vorpal's business.

Dated: March 11, 1980.

/s/ Joseph Michael
Joseph Michael

Subscribed and sworn to before me
this 11th day of March, 1980.

/s/ Gina Matteucci
Notary Public

VORPAL GALLERIES

Cash Account Balances (Per Book Balance)
at December 31, 1975; January 30, 1976;
February 27, 1976 and March 31, 1976

	Account	at 12/31/75	at 1/30/76	at 2/27/76	at 3/31/76
N.Y.	Man.Hanover Trust-Br.65		723.52	722.62	1,321.72
	Man.Hanover Trust-Br.10	483.05	561.35	(1,747.77)	(5,947.30)
	Bankers Trust		64.92	64.17	63.42
	Petty Cash		(289.12)	(264.12)	85.88
Chicago					
	Lakeshore National Bank	44.06	(746.66)	(201.70)	(392.50)
	Petty Cash	ø	ø	ø	ø
S.F.	Bank of America	1,466.36	(1,088.04)	(364.90)*	(339.90)
	Wells Fargo	(2,936.40)	811.28	(6,161.81)*	(383.11)
	W.F.Sav.6020-025300	420.52	420.52	420.52	420.52
	W.F.Sav.6020-052866	1.67	2.00	2.00	2.00
	Petty Cash	108.69	108.69	108.69	108.69
Laguna					
	Wells Fargo	-	1,823.45	2,864.31	718.24
	Security Pacific	205.63	20.96	176.09	343.56
	Petty Cash	ø	180.00	255.00	255.00

* Per Bank Reconciliations

Account	at 12/31/75	at 1/30/76	at 2/27/76	at 3/31/76
Repro				
Wells Fargo	1,376.24*	188.97	(727.54)	(995.71)
Barclay's Bank	(31.70)*	(384.96)	(608.71)	(608.71)
Petty Cash	169.29*	169.29	169.29	169.29
TOTAL	1,307.41	2,566.17	(5,293.86)	(5,178.91

* Per Bank Reconciliations

EXHIBITS TO AFFIDAVIT OF
JOSEPH MICHAEL NOT SHOWN

Exhibit 2 - Vorpal Gallery Balance Sheets Unaudited

pp. 1-2 - January 1, 1976
pp. 3-4 - January 31, 1976
pp. 5-6 - March 31, 1976

Exhibit 3 - Vorpal Gallery - Laguna Beach Unaudited

p. 1 - December 31, 1975, Balance Sheet (handwritten)

pp. 2-3 - Trial Balance, 1976 (handwritten)

p. 4 - March 31, 1976, Balance Sheet (handwritten)

p. 5 - December 31, 1975, Lakeshore Balance Sheet (handwritten)

pp. 6-7 - Chicago Trial Balance, 1976 (handwritten)

p. 8 - December 31, 1975, New York Balance Sheet (handwritten)

pp. 9-10 - January 31, 1976, New York - Balance Sheet

pp.11-12 - February 28, 1976, New York Balance Sheet

pp.13-14 - March 31, 1976, New York Balance Sheet

pp.15-16 - January 31, 1976, Reproductions Balance Sheet

pp.17-18 - February 29, 1976, Reproductions Balance Sheet

pp.19-20 - March 31, 1976, Reproductions Balance Sheet

Exhibit 4 - Vorpal Gallery Statement of Earnings from January 1, 1975 to December 31, 1975

Exhibit 5 - Vorpal Galleries - Consolidated Income State for the Twelve Months Ended December 31, 1975

Exhibit 6 - Vorpal Gallery Statement of Earnings from January 1, 1976 to March 31, 1976

Exhibit 7 - Vorpal Galleries - Consolidated Income Statement for Three Months Ending March 31, 1976

ATHEARN, CHANDLER & HOFFMAN
RICHARD HARRINGTON
111 Sutter Street
San Francisco, CA 94104

Attorneys for Respondent

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	No. 77-2104
	)	
v.	)	
	)	
MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES,	)	
	)	
Respondent.	)	
	)	

AFFIDAVIT OF
DONALD E. NORDENSTEN

The undersigned being duly sworn states:

I am a Certified Public Accountant. I have read the affidavit of Joseph Michael dated March 11, 1980. I have compiled the working capital items as of December 31, 1975, January 31, 1976, and March 31, 1976, shown in the balance sheets and trial balances attached to that affidavit. My compil-

ation of working capital items shows the following excess of current liabilities over current assets at the respective dates:

Date	Excess of Current Liabilities over Current Asets
December 31, 1975	$74,662
January 31, 1976	$80,370
March 31, 1976	$88,271

The term "current liabilities" is used to designate obligations whose liquidation is reasonably expected to require the use of existing resources properly classifiable as current assets. The term "current assets" is used to designate cash and other assets which are reasonable expected to be realized in cash or sold or consumed during the normal operating cycle of a business -- usually a period of twelve months. The term "working capital" means an excess of current assets over current liabilities and the term "negative working capital" means an excess of current liabilities over current assets.

The balance sheets and trial balances as of the aforementioned dates which were attached to the affidavit of Joseph Michael included those for Vorpal Gallery (which I was informed is located in San Francisco), Vorpal Gallery - Laguna Beach, Vorpal Gallery - Chicago, Vorpal Gallery - New York and Vorpal - Reproductions.

My compilation was limited to summarizing and totalling items identified as or identifiable as working capital items in the aforementioned balance sheets and trial balances, with the following exception. Two items shown in the trial balances for Vorpal Gallery - Laguna Beach could not be classified for compilation purposes without additional information. Such information was requested and received from the management of Vorpal Galleries.

The aforementioned balance sheets and trial balances are the representations of Joseph Michael and the management of Vorpal

Galleries and the aforementioned additional information is the representation of the management of Vorpal Galleries. Accordingly, I do not express an opinion or any other form of assurance on the balance sheets, trial balances or additional information used in my compilation of working capital items.

Dated: May 14, 1980.

/s/ Donald E. Nordsten
Donald E. Nordsten
Certified Public Accountant

Subscribed and sworn to before me
this 14th day of May, 1980.

/s/ Gina Matteucci
Notary Public

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. MICHAEL MULDOON ELDER, d/b/a VORPAL GALLERIES, Respondent.	)	No. 77-2104 ORDER

Application for Enforcement of an Order of the National Labor Relations Board

Before: TRASK and WALLACE, Circuit Judges, EAST,* District Judge

There must be substantial evidence in the record as a whole that retaliation for strike activity was the dominant or moving cause for the terminations. Western Exterminator Company v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977). We cannot say there is not. At one point, Elder stated that he would need to decrease his staff by one half to meet fi-

* Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

nancial difficulties. But instead of seven being discharged, eleven were terminated--all of the strikers. While the case is a close one, this, together with other evidence, is sufficient to uphold the Board.

There was no error in deferring to compliance proceedings the issue of whether or when the employees made an unconditional offer to return to work. NLRB v. International Association of Brideworkers, Local 433, 600 F.2d 770, 778 (9th Cir. 1979).

AFFIRMED.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date on the attached decision of the court.

Petition for Rehearing (FRAP 40)

A petition for rehearing may be filed within 14 days from the entry of judgment. A petition should not be filed in order to reargue the case but should only be filed to direct attention to material facts of law possibly overlooked in the decision. The 15 page limit allowed by the rule must be observed. In addition, 3 copies of the petition are required unless the petition includes a suggestion for rehearing en banc (in such instances 24 copies are required in addition to the original). The petition should of course be directed to the Clerk of the Court. A petition for rehearing must be submitted on 8 1/2 x 11 inch paper, must show complete proof of service to all parties, and the original must contain an original signature of the counsel/pro per litigant submitting the petition.

Bill of Costs (FRAP 39)

See Rule 39 of FRAP for information as to which party is allowed costs on appeal. If a party is allowed costs, the bill of costs must be filed within 14 days from the entry of judgment. Objections to the bill of costs by an adversary party must be filed within 7 days thereafter.

Issuance of the Mandate (FRAP 41)

The mandate is the certified copy of the judgment. The mandate is scheduled to be issued 21 days from the entry of judgment unless the court directs otherwise. A timely petition for rehearing will stay the issuance of the mandate. If the petition is denied, the mandage will be entered 7 days later. A direct motion for stay of mandate must be filed in an original plus three copies.

Petition for Writ of Certiorari

For information concerning the filing of this petition, refer to the rules of the Supreme Court of the United States.

APPENDIX I

227 NLRB No. 58 D--2188
San Francisco, California

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MICHAEL MULDOON ELDER, d/b/a/ VORPAL GALLERIES	
LESLEY M. FLESCH, an Individual	Case 20--CA--11047--1
LILAH THAYER TOLAND, an Individual	Case 20--CA--11047--2
SUSAN M ELSASS, an Individual	Case 20--CA--11047--3
SHIWA KARTSO HARRIS, an Individual	Case 20--CA--11047--4
JOHN W. JACCARD, an Individual	Case 20--CA--11047--5
MICHAEL TERRY JONES, an Individual	Case 20--CA--11047--6
MICHAEL MULCAHY, an Individual	Case 20--CA--11047--7
MARIETT MULLER, an Individual	Case 20--CA--11047--8
KATHRYN BURKE, an Individual	Case 20--CA--11047--9
LYNN KEARCHER, an Individual	Case 20--CA--11047--10

THOMAS J. WING WO, an Individual — Case 20--CA--11047--11

ORDER

On December 20, 1976, the National Labor Relations Board issued a Decision and Order[1/] in the above-entitled proceedings in which the Board found that the Respondent had unlawfully discharged striking employees and ordered him, inter alia, to reinstate them upon their proper application therefor and make them whole for any loss of pay they may have suffered by reason of their discharges and to notify such employees of their right to reinstatement.

Thereafter the General Counsel filed a motion for reconsideration of the Board's Order, requesting that it be revised to permit an interpretation that the question of whether the discharged strikers made an unconditional offer to return to work on January 26, 1976, may properly be deferred to

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1/ 227 NLRB No. 65, Members Fanning and Jenkins dissenting in part.

the compliance stage of these proceedings. The Respondent has filed an opposition to this motion.

We find nothing in the General Counsel's motion to warrant reconsideration of our previous Order. However, in the interest of resolving the issue joined by the motion and the opposition, we shall treat the motion as one for clarification of our Order.

The Order was not intended, nor should it be construed, as precluding the consideration of any matters affecting the remedy, including any unconditional offer to return to work made before the issuance of the Decision and Order, in the compliance stages of these proceedings.

Accordingly, it is hereby ordered that the Board's Order dated December 20, 1976, be, and it hereby is, clarified to provide that any issues normally litigable in the compliance stages, including the matters raised by the General Counsel in the instant

motion, are preserved for the compliance stages of these proceedings.[2/]

Dated: Washington, D.C. March 1, 1977

Betty Southard Murphy, Chairman

John H. Fanning, Member

Howard Jenkins, Jr. Member

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

2/ Although Members Fanning and Jenkins would not require the unlawfully discharged strikers to apply for reinstatement, they concur in this treatment of the motion for reconsideration and construction of the Order.

APPENDIX J

227 NLRB No. 65 D--1904
San Francisco, California

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MICHAEL MULDOON ELDER,
d/b/a/ VORPAL GALLERIES

LESLEY M. FLESCH, an Individual	Case 20--CA--11047--1
LILAH THAYER TOLAND, an Individual	Case 20--CA--11047--2
SUSAN M ELSASS, an Individual	Case 20--CA--11047--3
SHIWA KARTSO HARRIS, an Individual	Case 20--CA--11047--4
JOHN W. JACCARD, an Individual	Case 20--CA--11047--5
MICHAEL TERRY JONES, an Individual	Case 20--CA--11047--6
MICHAEL MULCAHY, an Individual	Case 20--CA--11047--7
MARIETT MULLER, an Individual	Case 20--CA--11047--8
KATHRYN BURKE, an Individual	Case 20--CA--11047--9
LYNN KEARCHER, an Individual	Case 20--CA--11047--10

THOMAS J. WING WO, an Individual

Case 20--CA--11047--11

DECISION AND ORDER

On June 17, 1976, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, Respondent and General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1/] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.

The Administrative Law Judge's recommended Order conditions the discharged strikers' right to reinstatement upon application

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1/ Contrary to the Administrative Law Judge's finding that no effort was made to offer reinstatement of any of the 11 employees who were laid off except one, there is evidence in the record indicating that some kind of offer of reinstatement was made to 2 others of the 11. We find it unnecessary to resolve this factual issue.

therefor,[2/] on their jobs not having been filled by permanent replacements prior to their applications for reinstatement. As the discharge of the strikers is found herein to have constituted a violation of Section 8(a)(1) of the Act, their reinstatement

---

2/ See Mid-West Paper Products Co., 223 NLRB No. 207 (1976), and cases cited therein. Our dissenting colleagues find unjustified solace in the fact that, in Mid-West Paper Products and other cases they cite, backpay has been awarded to discharged strikers from the date it is affirmatively shown that the strike ended and the discharged strikers either sought to return to work or showed that it would have been futile for them to have done so. In the absence of evidence of futility, the majority view has long been that the burden is on the strikers to apply for reinstatement, thus accounting for our colleagues' individual dissents in Mid-West Paper Products and in such cases as Valley Oil Co., Inc., 210 NLRB 370 (1974), and Astro Electronics, Inc., 188 NLRB 572 (1971). As was stated in the majority opinion in Astro Electronics, supra, at 573, in which Member Fanning participated and Member Jenkins dissented:

> Employees who are discharged while on strike . . . must indicate abandonment of the strike and a willingness to return to work, in order to establish their right to their jobs and resumption of wages unless there is a showing that such applications would be rejected, i.e., that it would have been futile.

rights cannot be affected by the hiring of replacements subsequent to their discharge. N.L.R.B. v. International Van Lines, 409 U.S. 48 (1972). We shall modify the recommended Order accordingly. We shall also require the Respondent to notify the discharged strikers immediately that each will be reinstated upon his making proper application therefor. Valley Oil Co., Inc., 210 NLRB 370 (1974).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that the Respondent, Michael Muldoon Elder, d/b/a Vorpal Galleries, San Francisco, California, his agents, successors, and assigns, shall take the action set forth in the said recommended Order, as herein modified:

1. Substitute the following for paragraph 2(a):

"(a) Immediately notify Lesley M. Flesch, Lilah Thayer Toland, Susan M. Elsass, Shiwa Kartso Harris, John W. Jaccard, Michael Terry Jones, Michael Mulcahy, Mariett Muller, Kathryn Burke, Lynn Kearcher, and Thomas J. Wing Wo, Jr., that he has no objection to their reinstatement, and thereafter, upon their unconditional application therefor, offer them reinstatement to their former jobs or, if such jobs are not available, to substantially equivalent jobs, and make them whole for any loss of pay they may have suffered by reason of their discharges in the manner set forth in the section entitled 'The Remedy.'

2. Substitute the attached notice for that of the Administration Law Judge.

Dated, Washington, D.C., December 30, 1976.

Betty Southard Murphy, Chairman

John A. Penello, Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

MEMBERS FANNING and JENNINGS, dissenting in part:

We dissent from the majority's conclusion that in the circumstances of this case the unlawfully discharged employees are not entitled to backpay until they request reinstatement. It is the obligation of the party who terminated the relationship to indicate the termination has ended.

The essential shortcoming of our colleagues' decision is that they treat the discharged employees here as economic strikers rather than as unlawfully discharged employees. Where a strike is not involved and an employee is unlawfully discharged, the employer is required to make a valid offer of reinstatement in order to toll backpay. An employer has no lesser obligation when, as here, the employees are unlawfully discharged

during a lawful strike.[3/] The existence of the strike is no reason to shift the burden to the employees to establish that they are available for employment.[4/] In either case,

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3/ Our colleagues' reliance on Mid-West Paper Products Co., 223 NLRB No. 207, only confirms the the point. The respondent in Mid-West was required to pay backpay from the end of the strike and to offer reinstatement to an unlawfully discharged striker who had not offered to return to the job from which he had been unlawfully discharged while on strike. There was no pretense that he would have supposed his job was available or that the employer, who had already told him his services were no longer wanted or required by the act of discharge, only awaited some indication from the discharged striker before welcoming him back. At least three of the cases cited therein, which the majority specifically relies on, hold that it is for the respondent to offer to return a wrongfully discharged striker to his job, not for that employee to seek out the employer who has thus wronged him. Universal Services, Inc., and Associates, 184 NLRB 381 (1970); Sea View Industries, Inc., 127 NLRB 1402 (1960); and Buzza-Cardozo, 97 NLRB 1342 (1952). The majority's protest and contrary characterization of those decisions, no matter how vehement, cannot alter what was said, held, or done there, one whit.

4/ Respondent's own unlawful discharges make it impossible to ascertain whether the unlawfully discharged strikers would have continued to strike, or if so for how long, in the absence of the unlawful action. Thus, any resulting uncertainty must be resolved against the Respondent.

the employer has unlawfully discharged employees and by such discharges has made it appear to them that they will not be taken back. Hence the burden of undoing the wrong must rest on the wrongdoer in either case. To hold otherwise permits an employer to undermine and inhibit a basic Section 7 right, the right to strike. If, in fact, the victims of the unfair labor practices are not available because they are striking or for other reasons, that is a matter to be decided in the compliance stage of these proceedings.

Dated, Washington, D.C., December 20, 1976

John H. Fanning, Member

Howard Jenkins, Jr. Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had a chance to give evidence, the National Labor Relations Board found that I violated the National Labor Relations Act and has ordered me to post this notice. I intend to carry out the Order of the Board, the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves
To form, join or help unions
To bargain collectively through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refuse to do any or all of these things.

I WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of the Act, by discharging my employees for engaging in concerted activities for the purpose of their mutual aid or protection.

I WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

I WILL immediately notify Lesley M. Flesch, Lilah Thayer Toland, Susan M. Elsass, Shiwa Kartso Harris, John W. Jaccard, Michael Terry Jones, Michael Mulcahy, Mariett Muller, Kathryn Burke, Lynn Kearcher, and Thomas J. Wing Wo, Jr., that I have no objection to their reinstatement, and thereafter, upon their unconditional application for such, offer them reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

I WILL make whole those strikers who are entitled to reinstatement for any loss of pay they may suffer by reason of my refusal, if any, to reinstate them in the manner set forth above.

MICHAEL MULDOON
ELDER
D/B/A VORPAL
GALLERIES

Dated: _____

By _____
(Representative) (title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of the posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415--556--0335.

APPENDIX K

San Francisco, Calif.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

MICHAEL MULDOON ELDER, d/b/a/ VORPAL GALLERIES	
LESLEY M. FLESCH, an Individual	Case 20--CA--11047--1
LILAH THAYER TOLAND, an Individual	Case 20--CA--11047--2
SUSAN M ELSASS, an Individual	Case 20--CA--11047--3
SHIWA KARTSO HARRIS, an Individual	Case 20--CA--11047--4
JOHN W. JACCARD, an Individual	Case 20--CA--11047--5
MICHAEL TERRY JONES, an Individual	Case 20--CA--11047--6
MICHAEL MULCAHY, an Individual	Case 20--CA--11047--7
MARIETT MULLER, an Individual	Case 20--CA--11047--8
KATHRYN BURKE, an Individual	Case 20--CA--11047--9
LYNN KEARCHER, an Individual	Case 20--CA--11047--10
THOMAS J. WING WO, an Individual	Case 20--CA--11047--11

Bernard T. Hopkins, Esq., and
Florence Mischel, Attorney,
for the General Counsel.

Kutsko, Moran & Mullin by Richard
Hague Moran, Esq., for Respondent

DECISION

Statement of the Case

RUSSELL L. STEVENS, Administrative Law Judge: This matter was heard at San Francisco, California on May 11, 1976.[1/] Charges were filed as follows:

Lesley M. Flesch	Case No. 20-CA-11047-1	1-27-76
Lilah Thayer Toland	Case No. 20-CA-11047-2	1-27-76
Susan M. Elsass	Case No. 20-CA-11047-3	1-28-76
Shiwa Kartso Harris	Case No. 20-CA-11047-4	1-28-76
John W. Jaccard	Case No. 20-CA-11047-5	1-28-76
Michael Terry Jones	Case No. 20-CA-11047-6	1-28-76
Michael Mulcahy	Case No. 20-CA-11047-7	1-28-76
Mariett Muller	Case No. 20-CA-11047-8	1-28-76
Kathryn Burke	Case No. 20-CA-11047-9	1-28-76
Lynn Kearcher	Case No. 20-CA-11047-10	1-28-76
Thomas J. Wing Wo, Jr.	Case No. 20-CA-11047-11	1-30-76

1/ All dates hereinafter are within 1976 unless stated to be otherwise.

On March 5 the Regional Director for Region 20 of the National Labor Relations Board issued an order consolidating the aforesaid cases, and issued a consolidated complaint (complaint). The complaint alleges that Michael Muldoon Elder (Elder, d/b/a Vorpal Galleries, hereinafter referred to as Respondent, violated Section 8(a)(1) of the National Labor Relations Act, hereinafter referred to as the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed by General Counsel and Respondent.

Upon the entire record, and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent is, and at all times material herein has been, a sole proprietorship, with an office and place of business in San Francisco, California, where it is engaged in the business of retail sale of prints and other art objects. During the past calendar year, in the course and conduct of its business operations, Respondent received gross revenues in excess of $500,000, and purchased and received directly from points outside the State of California, goods valued in excess of $50,000.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Issue

No labor organization is involved in this case. Respondent laid off or discharged

the 11 individuals named above, and the principal issue is whether they were laid off or discharged because of concerted activity protected by the Act, or because of Respondent's financial difficulties.

III. The Alleged Unfair Labor Practices

Background

Elder is, and has been since he opened the first gallery in 1962, the owner of Vorpal Galleries. The first gallery was established in San Francisco (herein called the gallery), and others thereafter were established in Chicago, Laguna (California) and New York City. The galleries at New York and Laguna were established in January and July, respectively, of 1975.

According to Elder's testimony (summarized on this subject in this paragraph), the San Francisco gallery involved "absolute and utter privation" for the first year and a half. The salesmen and saleswomen then worked on sales commissions only; they re-

ceived no salary. Beginning the third year of the gallery's existence, business began to improve. From then until the present there have been "a couple of fat year," but the financial situation of the gallery generally has been one of uncertainty. Almost from the beginning employees often have been paid late, from one day to several days. The gallery is not financed; Elder pays his employees "from the money that the business itself generated."

Business began to drop about the middle of 1974, and 1975 was a poor business year. As frequently happened in the past, employees were paid late on many occasions in 1974 and about 13 times in 1975, from a few days to as much as two weeks late. The employees became increasingly concerned by the late payments, and they held a meeting at the gallery in May 1975 to discuss the situation. Elder was present at request of the employees, and most of the employees named in the complaint

attended. The problem of late payment of salaries was discussed, as was the desire of the employees for a health insurance plan. Elder said he would try to "regularize" the payroll if the employees would give him 60 days in which to solve the problem, and he said he saw no objection to providing a health insurance plan for the employees. Such a plan was initiated in July, with employees and Vorpal Galleries equally sharing the premium costs. The plan lapsed in January 1976 due to Respondent's not paying the premiums. The pay situation improved after the May meeting, and salary checks regularly were received in September and October. However, the December 15 salary checks were only partially paid on December 18 and were not fully paid until December 24. Salary due January 1 was not paid until January 16, 1976.

The employees met on January 8 to discuss the late payment of their salary and to

discuss a rumor they heard about the health insurance policy having lapsed. Elder had been in New York City since about the middle of 1975 and did not attend the employees' January meeting. Donn Dowing (Downing), general manager of the gallery, and Barbara Gronbeck (Gronbeck), manager of the gallery, attended the meeting. Downing said there was no money for salaries, but that the situation would improve within 2 or 3 months. Downing said thought was being given to incorporation. He also showed the employees a letter from the insurance carrier (General Counsel's Exhibit No. 2), confirming the rumor that the insurance policy had lapsed and acknowledged that the lapse was his fault. Gronbeck asked Downing about the effects if there were to be a work stoppage, and Downing left the meeting after remarking that he was part of management. Gronbeck later was asked to leave the meeting, which she did. The employees then elected spokesmen to act in that capacity on

a rotating basis; Lilah Toland (Toland) was chosen as the first representative, a statement[2/] was agreed upon, and the following day Toland read it over the telephone to Elder, who still was in New York City. Elder said he would return the call, and the return call was made to Michael Mulcahy (Mulcahy) on January 10. Elder told Mulcahy that he only knew about the problem 2 days earlier; that the crisis was Downing's fault; that the employees would be paid as soon as sales were made; that an attempt would be made to have the health insurance policy reinstated; and that the situation apparently had reached the point at which the crucial question was who would quit rather than accept late salary checks. Elder said he would guarantee nothing.

Lynn Kearcher (Kearcher) called Elder the following day to give him the group's response[3/] and Mariett Muller (Muller)

2/ Respondent's Exhibit No. 1

3/ Respondent's Exhibit No. 2

called Elder the day after Kearcher called.[4/] The employees met on January 14, at which time Elder's response[5/] to Mulier's call was given to the employees, together with partial payment of salaries due January 1. The employees decided to picket, and picketing commenced January 15.[6/] Nearly all employees participated, informational signs were carried, leaflets were distributed to passersby, and passersby were engaged in conversation about the problem. The picketing was peaceful and nonobstructive and continued until January 25. However, picketing was discontinued for 1 day on January 16, and 1 day on January 19, at Downing's request.

On January 23 the employees involved herein were laid off for an indefinite period

---

4/ Respondent's Exhibit No. 3.

5/ General Counsel's Exhibit No. 3.

6/ The employees had stopped work and had gone on strike January 10.

of time and were given checks post-dated to January 26 for the remainder due to them and were give checks post-dated to January 26 for the remainder due to them as accrued salary and amounts due by reason of insurance premiums deducted from salary but not used for premium payments. No employee involved herein has been offered a job or rehired by Respondent (except one employee, discussed below).

Defense of Economic Necessity

Respondent interposes several defensive matters, but principally relies upon the contention that the employees were laid off because of the poor economic condition of the galary, rather than because they struck and picketed.

In support of this argument Elder testified: "except for a couple of fat year," the employees frequently have been paid late since the gallery was opened in 1962. Elder said his accountant, other dealers, friends,

and a client-friend who is a business consultant have advised Elder "consistently" since "years before the strike" that he had too many employees and should lay some of them off. Elder said he and Downing talked some time prior to the strike about the possibility of layoffs, but no action was taken. The financial situation deteriorated rapidly and badly in late 1975 and early 1976, resulting in more late salary payments and, eventually, the strike of the employees. General Counsel's Exhibit No. 3 is a copy of the employees' termination notice, which recites Elder's contention that the staff would have to be trimmed because there were more employees than the gallery's revenue could support.

Downing's testimony supported that of Elder. Downing stated that the gallery's income could not support the number of people on the payroll at the time of the strike. He stated that Respondent's Exhibit No. 4 is a

bookkeeping summary. A reading of that summary shows a drop in total sales of the gallery of approximately 33 percent for the months of December 1975 and January 1976, compared with the months of December 1974 and January 1975. Downing testified that the drop in "cash flow" during the winter of 1975-76 caused serious problems with the Internal Revenue Service (a Notice to Make Special Deposits of Taxes was served - Respondent's Exhibit No. 7), with the landlord (a Notice to Pay Rent or Quit was served - Respondent's Exhibit No. 5), with the State of California Board of Equalization (a Notice of Revocation of License was served - Respondent's Exhibit No. 8), and with creditors.

Discussion

A question concerning this defense is whether the factors relied upon to support it relate primarily to an economic situation or simply to poor management. The latter is

strongly suggested, and evidence relative to the former is equivocal.

Respondent relies upon its Exhibit No. 4 to show a drop in revenue from 1974-75 to 1975-76 of approximately 33 percent. However, that piece of evidence stands alone and is far from conclusive. There is no way to determine whether it shows all the revenue of the gallery, whether rental fees are included, whether inter-gallery transfers are involved, and whether any unusual transactions are reflected which could distort comparisons. Elder testified that funds are transferred among the four galleries to meet contingencies. There is no way to ascertain the effect, if any, such transfer may have had upon the financial situation of the San Francisco gallery. Finally, Respondent introduced no financial statements from which it can be ascertained whether the gallery was, in fact, in poor financial condition. Based upon these considerations, Respondent's

Exhibit No. 4 is accorded very little weight; certainly it does not support the contention that Respondent was unable to meet current expenses from current revenue.

Respondent relies upon evidence and testimony of difficulties with IRS, the landlord, the Board of Equalization and creditors to support its claim of serious economic straits in the winter of 1975-1976.[7/] However, Downing acknowledged that there have been problems with IRS and the landlord in the past, without any resultant layoffs of employees. No support was offered for the claim of difficulties with creditors (other than those named above). Downing and Elder testified to severe economic stress at the gallery almost continuously since it was opened (except for the two "fat years"), yet the stress resulted in no layoffs. To the contrary, the number of employees steadily has increased over the years. Finally, Elder

7/ See, also, General Counsel's Exhibit No. 3.

testified that he opened two new galleries in New York City and Laguna. He attempted to minimize the obvious impact of those openings on his claim of severe financial problems by stating that "very, very little" expenditure of funds was involved, but that attempt was not convincing. Certainly the New York City gallery was not inexpensive - it required Elder's continuous presence in that city for at least 6 months in 1975. Based upon these considerations, Respondent's claim of insolvency in late 1975 and early 1976 simply is not believable.

Elder contends that the layoffs involved herein were unavoidable and entirely proper. In support thereof, he testified that he felt a paternalistic responsibility for the employees; that he kept them on the payroll over the years, in spite of the recommendations by qualified businessmen and his own accountant, because of his feelings toward them and because they liked the work and were

willing to accept late pay in order to continue working for the gallery. This contention not only is unrealistic, it is contrary to Elder's own testimony.

a. Clearly the strike of the employees was unexpected and resented by Elder. He testified:

> So, the decision was to, at that moment, clean the slate and then, as soon as the cash came in, rehire the most -- some of the people and have them consolidate their activities so that we would have a much smaller staff. It was a physical impossibility to keep anybody there on the basis that they were, because they wouldn't be there, they'd be in front of the gallery and hindering our business.

b. Elder acknowledged that the strike precipitated the layoff. He stated:

> Q. The fact that they struck - was that responsible for your decision to lay them off?
>
> A. I'd say that certainly it was a factor. It had to be a factor. It called attention to the problem - it was a red flag.
>
> Q. But aren't you testifying, sir, that if the employees had not gone on strike they would not have been laid off?

A. No, I'm not testifying to that. I am testifying that they all would not have been laid off as soon as they were. I would think that's a fairly reasonable conclusion.

JUDGE STEVENS: Are you saying that they would have been laid off, but later?

THE WITNESS: Yes.

c. Elder's motive in making the layoff is shown by his stating, when asked whether the strike was a factor in the layoff:

> Well, if somebody is walking up and down in front of your business, wanting to -- with signs that lessen your capacity to survive, unless you're a fool you take it into consideration, of course.

d. Clearly, Elder had become accustomed to, and expected, acquiescence by the employees of late pay. He considers late salary payments in the same light as late payments for goods and materials:

> In business, generally you can buy materials and pay somebody within, say, a 30-day period or a reasonable period. The same kind of application had been functioning with the employees. They didn't particularly like it; they accepted it. The strike changed all that.

e. Rather than considering himself paternalistic, Elder considered the employees the possibly moving force in resolving his own financial problems. On many occasions he asked for their patience, good faith, positive assistance, voluntary reduction of staff, resumption of work, cooperative attitude, interruption of picketing and expressions of faith and trust. However, on no occasion did he offer to the employees a specific plan of action. He dealt only in generalities and platitudes. Even more telling, he insisted that the best way, and only practical way, out of the difficulty was for the employees to exert added effort to make sales, so cash would be available for salaries. This is a cynical approach, in view of the varied nature of jobs performed by the employees, and the long history of late salary checks. Elder's contention of paternalism is speculative and is not believable.

Elder testified that the business was a long series of ups and downs, mostly downs, yet there has been no previous layoff or temporary closing of the business. To the contrary, the business has grown over the years. Employees have been added, and put on salary rather than commission. New galleries were opened in cities widely dispersed across the country. Downing testified that business was down for the calendar year 1975 about $50,000 over 1974. However, he said the number of employees was about the same in both years, and the record shows a substantial turnover of employees. The picture thus is not one of a naive, paternalistic operator of a small and marginally successful art shop, as Respondent attempted to show. Rather it is one of a shrewd businessman who had a good thing going and was annoyed when it was brought to a halt by a strike.[8/]

8/ There had been no previous strike or work stoppage by employees.

This defense is found to be unsupported by the record.

Respondent's Contention that Success of the Staff Reduction Supports the Defense of Economic Necessity

One of the 11 employees who were laid off, John Jaccard (Jaccard), was rehired January 29 and worked until March 5. Jaccard testified that, when he was rehired, Gronbeck was doing office work, framing work was being contracted out to Michael Vensell, Richard Royce was working in the print shop, three persons were selling, Jean Dunne had been hired as a bookkeeper, a janitor had been hired, Renee Fittinghoff had been hired as a clerk, and Harriett Payne had been hired as a bookkeeper. Jaccard said about two-third of his work time was spent framing. He stated that the staff, other than himself, was totally new, and that the premises housing the gallery were the same as before the strike.

Downing testified that none of the 11 employees who were laid off have been replaced by new employees, but that three employees have been hired. The three are Diane Calthorpe, who sells and does clerical work; Jean Dunne, a bookkeeper; and Sean Duggan, a janitor. Downign said Vensell and Royce work on an independent contract basis, and Harriett Payne, an accountant for the reproductions shop, now also does accounting work for the gallery. On cross-examination Downing testified that Rene Fittinghoff did work formerly done by Kearcher and Elsass, 2 of the 11 who were laid off January 23.

Discussion

The testimony concerning events at the gallery after the layoff of January 23 is not entirely clear, but some things are apparent. First, the business continued and the premises remained the same. Second, some jobs were consolidated and some work was contracted out. Third, some new employees were

hired.[9] Finally, no effort was made to offer reinstatement to, or to rehire, the 11 who were laid off, other than employment of Jaccard from January 29 until March 5.

It is clear from the foregoing that there was little change at the gallery after the strike and layoff. The overhead possibly was decreased (although this was not shown), but there is no indication that there was any change adequate to rescue the business from the insolvency Downing claimed to have existed.[10] Respondent introduced evidence intended to show pressure being exerted by governmental and private creditors, and contended such pressure proved that the gallery was in dire financial straits. However,

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9/ The testimony is confusing and uncertain, but apparently three or four employees were hired, and possibly more, if part-time employees are included. One or two of the employees apparently had worked for the gallery on earlier occasions prior to the time involved herein.

10/ Insolvency was not established and probably did not exist.

such evidence may mean several things unrelated to financial condition of the gallery. The attitude toward employee salaries invites the conclusion that a similar attitude prevails toward other debts. In any event, the burden of proving financial motive was Respondent's burden. No financial statement or other convincing proof of financial condition was offered. The burden not having been met, this defense is not accepted.

IV. The Effect of the Unfair Labor Practices Upon Commerce

Respondent's activities set forth in Section III, above, occurring in connection wtih the operations of Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

The employees involved herein went on strike January 10 and commenced picketing January 15. A few attempts at negotiation, rather feeble and totally unsuccessful, were made by Elder and by the employees between January 10 and January 23. The employees named in the complaint were laid off January 23. However, based upon the record and the layoff notice given to the employees (General Counsel's Exhibit No. 4), it is clear, and found, that the employees were discharged rather than laid off.

The initial strike by employees was called by them primarily to protest Respon-

dent's repeatedly late payment of salaries. The strike was concerted activity protected by the Act, and it was in the nature of an economic, rather than an unfair labor practice, strike.

Elder acknowledged, and it is found above, that the strike precipitated Elder's discharge of the employees. Since the strike was protected by the Act, termination for striking constituted a violation of section 8(a)(1) of the Act.[11/]

The record does not show that the striking employees ever requested reinstatement.[12/] Their letter of January 15 (General Counsel's Exhibit No. 6) appears to be no more than a continued offer to negotiate. Further, the record does not show the dates of employment of replacement employees, nor the types of jobs to which they were assigned. However,

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11/ Rohmer Industries, Inc., 205 NLRB; Red Top, Inc., 185 NLRB 989.

12/ Mid-West Paper Products Co., 223 NLRB No. 207.

these matters can be determined at the compliance stage.

I shall recommend, therefore, that Respondent, upon application, offer the strikers named in the complaint reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to the extent that those positions were not permanent filled by replacements prior to any offer by the strikers unconditionally to return to work. Those strikers not reinstated pursuant to these provisions shall be placed on a preferential hiring list and shall be offered the first available positions for which they are qualified. I shall also recommend that Respondent make whole those strikers who are entitled to reinstatement for any loss of pay they may have suffered by reason of the Respondent's refusal, if any, to reinstate them upon request, by payment to each of them of a sum of money

equal to that which he or she normally would have earned as wages during the period beginning 5 days after the date on which he applies for reinstatement and terminating on the date of the Respondent's offer of reinstatement, such loss to be computed in the manner set forth in F. W. Woolworth Company, 90 NLRB 289. Interest at the rate of 6 percent per annum shall be added to the backpay, to be computed in the manner set forth in Isis Plumbing & Heating Co., 138 NLRB 716.[13/]

Upon the basis of the foregoing findings of fact, and upon the entire record, I hereby make the following:

Conclusions of Law

1. Michael Muldoon Elder, d/b/a Vorpal Galleries is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

13/ The Laidlaw Corporation v. N.L.R.B., 414 F.2d 99 (1969).

2. By discharging Lesley M. Flesch, Lilah Thayer Toland, Susan M. Elsass, Shiwa Kartso Harris, John W. Jaccard, Michael Terry Jones, Michael Mulcahy, Mariett Muller, Kathryn Burke, Lynn Kearcher, and Thomas J. Wing Wo, Jr., on or about January 23, 1976, and refusing to reinstate them for their having engaged in concerted activities for purposes of mutual aid and protection, Respondent has interfered with, restrained and coerced them in the exercise of their rights guaranteed by Section 7 of the Act and thereby has engaged in unfair labor practices proscribed in Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the above findings of fact, conclusions of law and the entire record, and

pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[14]

ORDER

Respondent, Michael Muldoon Elder, d/b/a Vorpal Galleries, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging its employees for engaging in concerted activities for the purpose of their mutual aid or protection.

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action:

14/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Upon application, offer to the strikers named above, reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to the extent that those positions were not permanently filled by replacements prior to any offer by said strikers unconditionally to return to work. Those strikers not so reinstated shall be placed on a preferential hiring list and shall be offered the first available positions for which they qualify. Respondent shall make whole those strikers who are entitled to reinstatement for any loss of pay they may suffer by reason of Respondent's refusal, if any, to reinstatement them in the manner set forth above in the section entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records,

timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms hereof.

(c) Post at its gallery in San Francisco, California, copies of the attached notice marked "Appendix."[15/] Copies of the notice on forms provided by the Regional Director for Region 20, after being duly signed by said Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to ensure that said

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15/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: June 17, 1976.

/s/ Russell L. Stevens
Russell L. Stevens
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and has ordered us to post this notice. We intend to carry out the Order of the Board, the judgment of any court, and to abide by the following:

The Act gives all employees these rights:

To organize themselves
To form, join or help unions
To bargain collectively through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refuse to do any or all of these things.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights guaranteed to them by Section 7 of the National Labor Relations Act, in violation of Section 8(a)(1) of the Act, by discharging my employees for engaging in concerted activities for the purpose of their mutual aid or protection.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL, upon application, offer to Lesley M. Flesch, Lilah Thayer Toland, Susan M. Elsass, Shiwa Kartso Harris, John W. Jaccard, Michael Terry Jones, Michael Mulcahy, Mariett Muller, Kathryn Burke, Lynn Kearcher, and Thomas J. Wing Wo, Jr., reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to the extent that those positions were not permanently filled by repalcements prior to the unconditional offer by said strikers to return to work. Those strikers not so reinstated shall be placed on a preferential hiring list and shall be offered the first available positions for which they qualify.

I WILL make whole those strikers who are entitled to reinstatement for any loss of pay they may suffer by reason of my refusal, if any, to reinstate them in the manner set forth above.

MICHAEL MULDOON
ELDER
D/B/A VORPAL
GALLERIES

Dated: _____

By _____
(Representative) (title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of the posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden

Gate Avenue, San Francisco, California 94102, Telephone (415) 556-0335.

Supreme Court, U. S.
FILED
DEC 2 1980
MICHAEL RODAK, JR., CLERK

No. 80-721

In the Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL MULDOON ELDER,
d/b/a VORPAL GALLERIES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer violated Section 8(a)(1) of the National Labor Relations Act by discharging 11 employees for engaging in a strike.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 51-52) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. 59-105) are reported at 227 N.L.R.B. 446. An order clarifying the Board's decision and order (Pet. App. 55-58) is reported at 228 N.L.R.B. 485.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10-17) was entered on August 6, 1980. The petition for a writ of certiorari was filed on October 31, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are reprinted at Pet. App. 1-3.

STATEMENT

Petitioner operates art galleries in several cities. At the San Francisco gallery, the only one involved in this proceeding, during the relevant period the employees were salaried and were paid twice a month. They were frequently paid late, especially in 1974 and 1975 when the gallery's business declined. In 1975, the employees were paid late on 13 separate occasions. In January 1976, a health insurance plan, instituted a few months earlier, was canceled because petitioner failed to pay the premiums (Pet. App. 74-76).

That same month, the employees (who were not represented by a union) met to discuss the late payments and the cancellation of the insurance plan. They spoke to petitioner on several occasions but no agreement was reached. On January 10, 1980, 11 employees stopped working and went on strike. On January 15, they began peaceful picketing in front of the gallery and continued for about ten days (Pet. App. 76-79). On January 23, all 11 striking employees were notified that " '[w]ith everything that has occurred, it is clear that Vorpal Gallery, San Francisco, has been radically overstaffed. * * * Therefore, you should consider yourself laid off * * *' " (Pet. 5-6; Pet. App. 80). The gallery continued to operate, subcontracting some of its work and arranging for the remainder to be performed by non-striking employees, by three newly-hired employees, and by two strikers who were recalled (Pet. 7-8; Pet. App. 90-92).

In findings upheld by the Board (Pet. App. 60), the administrative law judge determined that petitioner discharged the 11 striking employees because of their participation in the strike (Pet. App. 86-87, 94-95), and rejected petitioner's contention that the discharges were occasioned by economic necessity (Pet. App. 92-93):

> [T]here was little change at the gallery after the strike and layoff. The overhead possibly was decreased (although this was not shown), but there is no indication that there was any change adequate to rescue the business from the insolvency [General Manager] Downing claimed to

> have existed.[10] * * * In any event, the burden of proving financial motive was [petitioner's] burden. No financial statement or other convincing proof of financial condition was offered. The burden not having been met, this defense is not accepted.

[10] Insolvency was not established and probably did not exist.

The court of appeals found the Board's decision to be supported by "substantial evidence" (Pet. App. 51-52), noting that all of the strikers had been discharged even though by petitioner's own admission there was no financial need to terminate that many employees. "While the case is a close one, this, together with other evidence, is sufficient to uphold the Board" (*id.* at 52).

ARGUMENT

Petitioner urges (Pet. 13) that in view of his "proper" economic motive for "plac[ing the] strikers on layoff," it was improper for the Board "to rest a finding of unfair labor practice upon the proposition that the employer was also angry with the strikers * * *." However, the Board found petitioner's defense of economic necessity "to be unsupported by the record" (Pet. App. 90), and the court of appeals affirmed. Thus, the issue here is not what standard should be applied when there exist both good cause and an unlawful one for the discharge,[1] but instead

[1] Petitioner correctly notes that there is a conflict among the circuits as to the standard to be applied in discriminatory discharge cases where there is evidence that an employer had both proper and improper motives for the discharge. As

whether substantial evidence supports the Board's finding that the employees were discharged because of their protected strike. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the Board's finding is amply supported by the record. Petitioner Elder, the owner of the gallery, admitted that without the strike he would not have laid off the employees until later (Pet. App. 8). He also admitted that as a result of the strike

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demonstrated above, the Board found no such dual motive here.

On August 27, 1980, the Board issued a decision and order in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. No. 150, in which it reconsidered its traditional test for determining whether an employee discharge violates the Act, and reformulated it to conform to this Court's analysis in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Thus, the Board announced in *Wright Line* that henceforth it will apply the following test in discharge cases (slip op. 20-21):

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that [the employer's opposition to] protected [employee] conduct was a "motivating factor" in the employer's [discharge] decision. Once this is established, the burden will shift to the employer to demonstrate that the [discharge] would have taken place even in the absence of the protected conduct. [Footnote omitted.]

The Board indicated its intention to apply the new test to both "pretext" and "dual motive" cases (slip op. 20 n.13). Had that test been applied here, the outcome would have been no different. The facts on which the Board relied (see pages 2-3, *supra* and text and page 5, *infra*) established a prima facie case of discrimination, and the Board properly rejected petitioner's assertion that the discharges would have occurred in any event because of economic considerations.

he decided to "clean the slate" by terminating all the strikers and then rehiring some of them, instead of laying off only those employees in excess of the number needed (Pet. App. 5). Moreover, all striking employees were terminated and all non-striking employees retained. In addition, after the strikers were discharged, petitioner hired three new employees who performed work previously done by strikers. Meanwhile, most of the strikers were never offered reinstatement. These facts warrant the conclusion that petitioner was seeking to retaliate against the strikers rather than simply to reduce an oversized staff.

2. Petitioner's argument (Pet. 27-28) that the case should be remanded to the Board for consideration of the gallery's financial statements is not properly before this Court. The relevant financial statements related to a period ending in January 1976 when the strikers were discharged. Petitioner has never contended that the documents were not available between that date and December 20, 1976, when the Board issued its Decision and Order in this case.[2] Under Section 102.48(d)(1) of the Board's Rules and Regulations (29 C.F.R. 102.48(d)(1)),[3] the petition-

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[2] Petitioner notes (Pet. 27) that his accountant's affidavits concerning the financial statements did not exist until early 1980. However, nowhere in the affidavits (Pet. App. 39-50) or in petitioner's other submissions is there a suggestion that the financial statements themselves did not exist in 1976.

[3] This section provides, in pertinent part:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.
>
> * * * * *
>
> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not

er could have moved to reopen the record even after issuance of the Board's Decision and Order to adduce newly discovered or previously unavailable evidence. It did not do so. Accordingly, the contention that the Board should now consider the statements is barred by Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).[4] *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *Cascade Employers' Ass'n* v. *NLRB*, 404 F.2d 490, 492 (9th Cir. 1968).

Moreover, the Board's application for enforcement of its order was filed in the court of appeals on May 17, 1977. The court did not issue its decision enforcing the Board's order until April 30, 1980. At no time during this period of nearly three years did petitioner apply to the court for leave to adduce additional evidence as authorized by Section 10(e) of the Act; it did so only after the court decided the case in the Board's favor. The belated motion to augment the record to include the financial statements, and the accompanying petition for rehearing, were denied by the court of appeals without comment (Pet. App. 20, 33). Ordinarily, this Court does not consider issues neither raised in nor decided by the court of appeals (see *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)), and does not address

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presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

[4] Section 10(e) is reprinted in full at Pet. App. 1-3. The relevant portion reads: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused."

questions raised belatedly in a petition for rehearing unless they are actually decided by the court below (see *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935); cf. *Garner* v. *United States*, 424 U.S. 648, 656 n.10 (1976) (declining to pass on contentions "not deemed of sufficient merit to warrant discussion below")). Review of a refusal to remand for consideration of additional evidence would be particularly inappropriate where, as here, petitioner chose to stand on the existing record, and sought to adduce additional evidence only after it lost at the administrative level and on appeal. See *Partenweederei, MS Belgrano* v. *Weigel*, 313 F.2d 423, 424-425 (9th Cir. 1962); *Local No. 1505, IBEW* v. *Local Lodge No. 1836, IAM* 304 F.2d 365, 368 (1st Cir. 1962), vacated as moot, 372 U.S. 523 (1963); *Jones* v. *Zurich General Accident & Liability Ins. Co.*, 121 F.2d 761 764 (2d Cir. 1941).[5]

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[5] In any event, the motion to augment the record was properly denied because the evidence at issue could not have changed the result in this case and was therefore not "material" within the meaning of Section 10(e). *NLRB* v. *Mexia Textile Mills*, 339 U.S. 563, 569-570 (1950). At most, the evidence would show the existence of economic reasons for terminating some employees. However, it is clear that the court of appeals enforced the Board's order not because no justifiable ground for terminating employees existed, but because substantial evidence (summarized at pages 4-5, *supra*) supported the Board's finding that the employees' protected strike activity was the moving cause of their discharge, and because in the absence of the strike the discharge would not have occurred. See note 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333863 176